

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
LUFKIN DIVISION

KERRY WAYNE GRIFFIN

§

VS.

§

CIVIL ACTION NO. 9:14cv16

UNITED STATES OF AMERICA

§

ORDER OVERRULING OBJECTIONS AND ADOPTING
THE MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

Kerry Wayne Griffin, an inmate confined at the Federal Correctional Institution at Seagoville, Texas, proceeding *pro se*, filed the above-styled motion to vacate, set aside or correct sentence. The court referred the matter to the Honorable Zack Hawthorn, United States Magistrate Judge, for consideration pursuant to applicable orders of this court.

The Magistrate Judge has submitted a Report and Recommendation of United States Magistrate Judge concerning this case. The Magistrate Judge recommends the motion to vacate, set aside or correct sentence be dismissed.

The court has received and considered the Report and Recommendation of United States Magistrate Judge, along with the record and pleadings. Movant filed objections to the Report and Recommendation. The court must therefore conduct a *de novo* review of the objections in light of the applicable law.

In his plea agreement, movant waived his right to direct and collateral appeal except for reserving the right to appeal: (a) any punishment imposed in excess of the statutory maximum and (b) a claim of ineffective assistance of counsel that affected the validity of the waiver or the plea itself. Movant complains he received ineffective assistance of counsel because counsel failed to object to the use of certain criminal convictions in calculating his criminal history score. While this ground for review contends the court incorrectly calculated movant's sentencing range under the United States Sentencing Guidelines, it does not contend movant received a punishment greater than the statutory maximum. Further, while the ground for review does allege ineffective assistance of counsel, the alleged deficiency on the part of counsel did not


affect the validity of movant's guilty plea or the waiver of his right to appeal. Instead, the alleged deficiency caused movant to receive a longer sentence. As a result, movant's ground for review may not be raised in this proceeding because he waived his ability to assert it.

Accordingly, the objections are **OVERRULED**. The proposed findings of fact and conclusions of law of the Magistrate Judge are correct and the report of the Magistrate Judge is **ADOPTED**. A final judgment will be entered dismissing this motion to vacate.

In addition, the movant is not entitled to the issuance of a certificate of appealability. An appeal from a judgment denying federal habeas relief may not proceed unless a judge issues a certificate of appealability. *See* U.S.C. § 2253. The standard for granting a certificate of appealability requires a movant to make a substantial showing of the denial of a federal constitutional right. *See Slack v. McDaniel*, 529 U.S. 473, 483-84; *Elizalde v. Dretke*, 362 F.3d 323, 328 (5th Cir. 2004). In making a substantial showing, the movant need not establish that he should prevail on the merits. Rather, he must demonstrate that the issues are subject to debate among jurists of reason, that a court could resolve the issues in a different manner, or that the questions presented are worthy of encouragement to proceed further. *Slack*, 529 U.S. at 483-84; *Avila v. Quarterman*, 560 F.3d 299, 304 (5th Cir. 2009). Any doubt regarding whether to grant a certificate of appealability should be resolved in favor of the movant. *See Miller v. Johnson*, 200 F.3d 274, 280-81 (5th Cir. 2000).

In this case, the movant has not shown that the issue of whether he waived his right to assert his ground for review is subject to debate among jurists of reason. In addition, the questions presented with respect to this issue are not worthy of encouragement to proceed further. As a result, a certificate of appealability shall not be issued.

SIGNED this 3rd day of March, 2016.


MICHAEL H. SCHNEIDER
UNITED STATES DISTRICT JUDGE